



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 27 2001

THE ADMINISTRATOR

The Honorable John D. Dingell
U.S. House of Representatives
Committee on Energy and Commerce
Washington, D.C. 20515-6115

Dear Congressman Dingell:

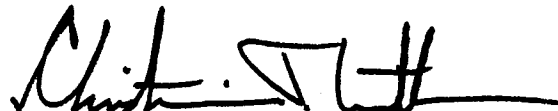
Thank you for your letter of October 12, 2001, in which you raise several questions concerning the Environmental Protection Agency's (EPA) implementation of the New Source Review (NSR) program. I agree that NSR is a valuable program for clean air.

The EPA has been conducting a review of the NSR program in response to a recommendation from the President's National Energy Policy Development Group. The EPA is examining the impact of the NSR regulations, including administrative interpretation and implementation, on investment in new utility and refinery generation capacity, energy efficiency and environmental protection. As part of this process, we have heard comments from over 130,000 individuals and organizations. A number of these comments raise concerns very similar to those in your letter. Other commenters are very concerned that the environmental improvements associated with the NSR program not be lost as we seek to streamline the program. I assure you we are considering these comments fully as we move forward. The EPA plans to report to the President on the impact of NSR on the three areas mentioned above. At that time we will make recommendations on whether improvements to the NSR program are needed to provide more flexibility and certainty, while ensuring protection of the environment.

Your letter of October 12th posed detailed questions and requested documentation concerning various aspects of the NSR rules' exemption for activities that are "routine maintenance, repair and replacement." Enclosed with this letter is a response to those questions and documents requested.

Thank you for expressing an interest in strong, reasonable, responsible efforts and enforcement mechanisms to address the nation's environmental concerns. I believe we can meet the requirements of the Clean Air Act without jeopardizing the nation's need for safe, affordable and reliable energy supplies. Please do not hesitate to contact me if you would like to discuss NSR issues in greater detail, or your staff can contact Lora Strine in the Office of Congressional and Intergovernmental Relations at 202-564-5711.

Sincerely yours,



Christine Todd Whitman

Enclosures

cc: The Honorable W.J. Tauzin, Chairman
Committee on Energy and Commerce

The Honorable Joe Barton, Chairman
Subcommittee on Energy and Air Quality

Enclosure 1

1. EPA's NSR rules contain an exemption from the definition of modification for any activities constituting "routine maintenance, repair and replacement." (Cite omitted) In the preamble to the 1992 NSR rulemaking package, EPA indicated that whether a repair is "routine" depends upon a "case-by-case" determination "based on [an] evaluation of whether that type of equipment has been repaired or replaced by source within the relevant source category." However, apart from this language, EPA has explained the meaning of this exemption only through various applicability determinations. These determinations enunciated a "four factor" test based on the "nature and extent, purpose, cost, and frequency" of the modification. (Memorandum from Don R. Clay, EPA Acting Assistant Administrator to David A. Kee, USEPA, Region V (September 9, 1988); *Wisconsin Electric Power Company v. Reilly* ("WEPCO") 893 F.3d 901 (1990); *EPA v. TVA*, CAA Docket No. 00-6 at 48 (EAB Sept. 15, 2000)).

(a) Has EPA's interpretation of specific repair and replacement activities covered by the routine maintenance exemption remained consistent over time? Are there any repair and replacement activities that EPA ever determined were not covered by the routine maintenance exemption and that it later determined were covered, or vice versa? If so, what were the reasons for the differing interpretations?

EPA's interpretation of the exclusion has remained consistent over time. We have attached, as examples, a series of applicability determinations and letters of opinion provided by the Agency on the routine maintenance, repair and replacement exclusion. Most of these documents are publicly available through EPA's NSR Policy Database (<http://www.epa.gov/region07/programs/artd/air/nsr/nsrpg.htm>). As you will see, most of the analyses found the specific project to be non-routine. We have reviewed many documents, including the attached documents, as part of our litigation activities, and believe that all available documents show that the EPA has been consistent in its position on routine maintenance, repair and replacement. See Enclosures #2 through #18 and # 22 through #27.

The next two questions are addressed together, as they raise related issues:

(b) Did the Agency ever take comment on or consider taking comment on the "four factor" test? In determining whether a change constitutes "routine maintenance" should a source be guided by the language of the preamble, quoted above, or the text of various applicability determinations?

(c) In its 1992 NSR amendments package, EPA promised to "issue guidance on [the] subject [of routine maintenance]" Has this guidance ever been issued and if not, does EPA plan on issuing such guidance? If so, please provide such guidance. Could such guidance be helpful in resolving much of the controversy related to the definition of "routine maintenance"?

In the EPA's view, what is "routine" is to be interpreted in a common sense fashion; it is not a specialized term under the Clean Air Act. The Agency has, however, followed certain criteria in applying this term. The attached memorandum from Don R. Clay (Enclosure #13d), as well as the Agency's statements in the preamble to the 1992 "WEPCO Rule" and applicability determinations made to date, together describe EPA's approach to assessing what activities constitute "routine maintenance, repair and replacement." In short, EPA evaluates all relevant information about the project including the nature and extent, purpose, cost and frequency. This approach was upheld as a reasonable interpretation of routine maintenance, repair and replacement in WEPCO v. Reilly, 893 F.2d 901 (7th Cir. 1990).

In the 1992 WEPCO rule preamble, EPA did discuss the possibility of issuing guidance on the subject of routine maintenance. In 1994, EPA staff, as part of their meetings with the Clean Air Advisory Committee, developed, for discussion purposes only, a document on how "routine" could be defined. EPA received a substantial volume of adverse comments on this document. Many commenters stated that the existing guidance was adequate and that the Agency should not establish a regulatory definition of routine maintenance. Consequently, the Agency decided not to include a detailed definition of the exclusion in its 1996 NSR reform proposed rulemaking.

The attached set of applicability determinations, letters of opinion by the Agency, the WEPCO case, and the Environmental Appeals Board's recent decision in Tennessee Valley Authority, Docket No. CAA-2000-04-008, (2000) ("TVA"), provide a detailed and robust discussion of EPA's views on the subject of routine maintenance, repair and replacement. We currently are considering ways to condense and streamline the guidance provided in these documents to make it easier to apply the exclusion in practice.

(d) Does the agency expect sources contemplating repair and replacement activities to seek an applicability determination in all cases? Are there any repairs or replacement activities that per se constitute routine repair or replacement? Using the "four factor" test, would it be possible for a source (as opposed to EPA) to determine with certainty and reliability whether its proposed repair or replacement activities are routine?

EPA does not expect every source contemplating a repair and replacement activity to seek an applicability determination. We believe that in most instances a source can readily make an accurate determination regarding whether an activity it plans to undertake falls under the routine maintenance exemption. If a source is uncertain whether it is applying NSR regulations correctly, it may consult the appropriate permitting authority, which is normally a state or local air pollution control agency. In the event the permitting authority needs additional assistance, it can consult with EPA.

Because of the case-by-case and common-sense nature of the review of maintenance activities for routineness, EPA has not developed any lists of repair or replacement activities that per se constitute routine repair or replacement as part of the NSR program. Sources can feel

comfortable, however, that maintenance activities conducted on a daily, weekly, or monthly basis and that are financed out of an annual maintenance budget are routine. We believe sources are currently able, in most cases, to distinguish between what is a routine maintenance, repair or replacement activity and what is a major modification for purposes of NSR. As noted above, however, currently we are considering ways to provide additional clarity with regard to the routine maintenance exclusion. Creating lists for particular industry sectors is one approach that we are exploring.

(e) Please indicate the number of applicability determination requests (regarding routine maintenance) that the agency has received for power plants since 1990. Please provide the average time required by EPA to respond to such requests, as well as the range of times needed for EPA to respond to such requests.

Of the attached EPA documents, seven relate to power plants. In the Agency's experience, the time needed for EPA to respond to such requests ranges from thirty to sixty days. Most responses, however, are completed within thirty days. Applicability determinations taking over a year, such as the Detroit Edison determination, are not a common occurrence, and can be due, in part, to delays in obtaining necessary information.

(f) In its May 23, 2000 applicability determination for the Detroit Edison, EPA noted that "significantly enhanc[ing] the present efficiency" of the plant "signifies that the project is not routine" (letter from EPA Regional Administrator Francis Lyons to Henry Nickel at 2 (May 23, 2000)). How often do repair or replacement activities at power plants improve efficiency? How does the EPA measure an enhancement of efficiency, or determine whether such an enhancement is "significant"? Is there written guidance on this matter? What is the statutory authority for this determination?

In connection with the Detroit Edison determination, EPA identified a number of relevant factors in determining that the project was not routine; enhanced efficiency alone was not the determining factor in that particular analysis. EPA does not have written guidance on how it measures an enhancement of efficiency, nor how it determines whether such an enhancement is "significant." In the Detroit Edison determination, Detroit Edison provided the measurement of increased efficiency itself.

As stated before, we apply a common sense analysis to the proposed activity. Detroit Edison involved a complete redesign of a major component in the generating system. We determined that this project was not routine. Nevertheless, it is important to point out that whether such an activity triggers NSR requirements is also dependent on whether the non-routine change will cause a significant increase in emissions. In Detroit Edison, the company represented to EPA that the dense pack project would not cause a significant emissions increase; the Agency responded that if that is true, then Detroit Edison could proceed with the project without first obtaining a permit under major NSR.

As to your question about the statutory authority for "this determination," it is our understanding that you are referring back to the prior sentence discussing a determination that an efficiency enhancement is "significant" in the context of an analysis of the routine maintenance, repair and replacement exemption. EPA's authority to establish and implement the regulatory exclusion for routine maintenance stems from the Agency's authority to issue regulations as are necessary to carry out its functions under the Act, see CAA 301(a), as well as the Congressional intent behind the Act, as exemplified in the findings, declaration of purpose and requirements.

(g) The routine maintenance exemption allows plants to undertake activities that make it possible for a plant to continue in operation during its normal life. What is EPA's current view as to the lifetime of a power plant? How does this compare to the current age of existing power plants?

EPA does not agree that any and all activities that a facility may undertake for purposes of continuing operation during its normal life fall within the routine maintenance, repair and replacement exemption. It is very possible that a facility could undertake a non-routine activity during its normal life.

Until the mid 1960s, engineering textbooks for utility boiler designers and operators noted that plants were expected to cease operations at the end of the useful life of major components at the plants. These textbooks cited average useful lives in the order of 30 years. Today, however, the economic useful life of a plant is determined by economic factors. We understand that today's practice is to extend the useful life of a facility by replacing or modifying the major components as they wear out, thereby enabling a plant to keep running indefinitely. These types of changes, in EPA's view, do not constitute routine maintenance. We have attached a histogram [Enclosure #21], illustrating the date of first operation of existing coal fired power plants, which generally ranges from 0 to 50 years.

2. In determining whether a modified source must undergo complete NSR permitting, we understand that by limiting emissions, or availing themselves of other exemptions, sources have considerable flexibility to avoid such permitting requirements. Please explain the ways in which a source may do so.

First, a source must determine whether or not an exclusion applies, and consequently whether or not the activity is excluded from the definition of major modification. If the exclusion does not apply, the source may then employ other mechanisms that allow it to avoid triggering NSR even when it undertakes a non-excluded activity. That being clarified, the following briefly explains both existing exclusions and flexibility options provided in the regulations.

The regulations provide for certain exclusions from the definition of major modification, and hence, from NSR. The exclusion for routine maintenance, repair or replacement is one of

these regulatory exclusions. These exclusions also include certain changes in fuels or raw material usage, and certain increases in hours of operation or production rate. The complete list of exclusions can be found at 40 CFR 52.21 (b)(2)(iii).

EPA also feels that certain pollution control and pollution prevention projects should not be subject to the requirements of major NSR. The 1992 WEPCO rule specifically provides for this exclusion for electric utility steam generating units. In addition, a July 1, 1994 EPA memorandum "Pollution Control Projects and New Source Review (NSR) Applicability" established guidelines for evaluating projects at all source categories for possible exclusion from major NSR. In accordance with this document, sources may apply to their permitting authority for exclusion from major NSR.

If the physical change or change in the method of operation does not fit within the scope of the regulatory exclusions, it still must result in a significant net increase in emissions before major NSR would apply. The regulations set forth significance levels in tons per year (e.g., 40 tpy for SO₂); changes that result in emissions increases below these levels are not subject to major NSR.

In addition, sources may be able to avoid NSR permitting by managing their emissions. A source that undertakes a non-excluded activity that increases emissions, but seeks to avoid NSR, may do so in one of two primary ways – limits on emissions and emissions netting, both of which enable the source to limit the net emissions increase from the change to less than the applicable significance level. A source may obtain enforceable limitations on emissions, often permitted as production or operation restrictions, to restrict the potential emissions from a new or modified unit. In addition, a source may use reductions elsewhere at its facility to "net out" increases at the modified and affected units. Thus, through emissions netting, a source may be able to offset increases through, among other ways, addition of controls on existing equipment or retirement of older units. If, through using either or both of the above options, the source can limit its emissions so that the non-excluded change does not result in a significant net emissions increase, then the change would not trigger major NSR.

3. What is EPA's view with regard to the functioning of NSR for new sources, as opposed to modified sources? Has NSR functioned effectively for new sources?

Since its inception, NSR has been very successful in achieving air emission reductions. We estimate that over the past several years the NSR program has prevented at least 1.2 million tons per year of new emissions. In addition to the emissions reductions, the NSR program has sparked improvements and innovations in pollution control technology. Whenever demand for good control technology exists, vendors compete to supply better control technology at lower cost. This competition reduces the cost of controls as the control technology improves. This technology-forcing aspect of the program is an important reason why it has been so successful in allowing for continued economic growth while ensuring environmental protection.

While we believe NSR accomplishes its intended purpose for both new and modified sources, we are continually seeking ways to make the program work more efficiently and effectively. Most of the concerns about NSR raised by commenters address modifications at existing sources, and we are evaluating the extent to which our improvements should focus on such concerns. EPA is currently considering making regulatory changes in an effort to achieve more certainty and flexibility for all sources in the program, while maintaining the environmental protection afforded under NSR.